Supreme Court of the United States

October Term, 1951.

No. 309.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - *Petitioner,*

v.

THE B. F. GOODRICH COMPANY, - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Opinions of the State Court.

Louisville and Jefferson County Metropolitan Sewer District (herein called "Petitioner"), for the second time, seeks a review by this Court of the June 25, 1948, decision of the Court of Appeals of Kentucky (herein called the "Kentucky Court"), officially reported in 307 Ky. 689 (R 61-73).[1]

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[1] *Bond Bros.* v. *Louisville and Jefferson County Metropolitan Sewer Dist., et al.*, and *The B. F. Goodrich Co.* v. *Louisville and Jefferson County Metropolitan Sewer Dist., et al.*, 307 Ky. 689, 211 S. W. 2d 867.

In *Louisville and Jefferson County Metropolitan Sewer District* v. *Bond Bros.*, 339 U. S. 943, 94 L ed 1358, this Court denied Petitioner's application to review that decision of the Kentucky Court in which the Kentucky Court decided not only the *Bond Bros.* case, but this case. Petitioner makes no reference to this Court's earlier action.

By its decision, the Kentucky Court held valid and enforceable the reservation of a right to use a sewer for storm water and sewage drainage, which reservation, made contemporaneously with the grant of an easement for the construction of a sewer, was embodied in a deed and in a judgment (R 26, 62). Petitioner also seeks a review of the June 12, 1951, decision[1] (R 83) of the Kentucky Court on a subsequent appeal by it in this case, in which decision the Kentucky Court merely held that the issues raised had been determined by its former opinion.

The facts upon which the decision of the Kentucky Court is based and the decision of the Kentucky Court are applicable only to a tract of land near Louisville, Kentucky, a part of which is owned by Respondent and a part of which is owned by Bond Bros. The question presented is not one of any general importance in that area, or elsewhere.

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[1]*Louisville and Jefferson County Metropolitan Sewer District* v. *Goodrich*, (Ky.), 240 S. W. 2d 621, (not officially reported).

The Facts.

The circumstances under which the sewer easement was granted and the right to the use of the sewer reserved are stated in the opinion of the Kentucky Court (R 63). Producers Wood Preserving Company (herein called "Producers") owned a tract of 170 acres of which the land now owned by Respondent is a part. Producers used Paddy's Run, a creek which passed through the tract, for the disposal of a large volume of water utilized in its creosote plant. In 1929 Petitioner's predecessor, the Board of Sewerage Commissioners, sought to condemn an easement through the tract, following the course of Paddy's Run, for the purpose of constructing a large sewer. The resulting litigation was concluded with the entry of a judgment (R 26) and the execution by Producers of a deed of easement embodying the terms and conditions specified in the judgment.

In both the deed and judgment there expressly reserved by Producers the right to use without charge the sewer to be constructed. It was also expressly provided in the deed that all agreements and covenants should run with the land and be for the benefit of the successors and assigns of the parties (R 63).

From 1929 when the grant of easement was made until 1946 no objection was made to the use of the sewer by Producers and its successors without charge, although other property owners were required to pay sewer charges (R 65). When Petitioner was created by Act of General Assembly of Kentucky in 1946 (R 2)

and took possession and control of the sewer system theretofore owned by the City of Louisville, Petitioner asserted that it had been given the statutory power to charge Respondent for the use of the sewer and thus nullify the judgment formerly rendered and the reservation in the deed theretofore made, and thus destroy without payment of compensation the vested property right of Respondent to the use of the sewer.

Respondent filed this action (R 2) praying that Petitioner be perpetually enjoined from imposing a charge upon Respondent for use of the sewer. The trial court held that the judgment and deed reserved only the right to make a connection to the sewer without a charge and not the right to the use of the sewer without payment of sewer service charges subsequently imposed. The petition was dismissed in so far as it related to the use of the sewer without charge.[1]

On appeal the Kentucky Court reversed the judgment of the trial Court. Petitioner by this petition for writ of certiorari seeks a review of that decision (R 61-73).

The precise questions decided by the Kentucky Court are:

> 1. The judgment and deed to which Producers and Petitioner's predecessor were parties "granted Producers, for a valuable consideration, the use of this sewer and * * * such right and

[1]By its petition Respondent also challenged the right of Petitioner to charge higher rates for sewer service for property situated outside the City of Louisville than for property situated within the City. That question, ultimately determined contrary to the contention of Respondent, is not pertinent here.

use passed to its successors in title to the land for similar industrial purposes" (R 66).

2. Petitioner may not, without paying compensation, destroy Respondent's rights set forth in the deed and judgment to which Producers was a party, since there "is in fact no imperious demand requiring the use of the police power to take property without compensation or destroy a contract or nullify a judgment" (R 69).

3. Respondent's right to the use of the sewer is protected by the provisions of Sections 1 and 13 of the *Kentucky Constitution*,[1] which recognizes "as inalienable 'the right of acquiring and protecting property' and declares that the property of no citizen shall be taken 'or applied to public use without the consent of his representative and without just compensation being previously made to him' " (R 68).

The decision of the trial court denying the injunction prayed was reversed, the opinion of the Kentucky Court being to the effect that Respondent should have been granted an injunction. The case was remanded for proceedings consistent with the opinion.

Petitioner thereupon sought to re-try the issues and tendered in the trial Court a pleading designated as an amended answer and a counterclaim for declaration of rights (R 76), in which it urged as new and additional grounds for denial of the injunction:

(1) that the use reserved by Producers was limited to the improvements situated on the tract

[1]Appendix p. 18.

at the time of the grant of easement and reservation of right; and

(2) that Petitioner had abrogated that part of the contract with Producers "which was discriminatory and illegal, to-wit, the furnishing of services rent free for any sewerage" and had so notified Respondent and Bond Bros., the then owners of the tract in question; and that it offered to pay them the value of the easement acquired in 1928 "subject to credit for all payments made for said easement and subject to credit for all other considerations granted to said Producers Wood Preserving Company in said contract, including the sewer privileges heretofore enjoyed and the right to continued use of said main sewer for natural drainage."

The trial Court refused to permit the filing of the pleading tendered and granted the injunction as directed by the opinion of the Kentucky Court (R. 81).

The Kentucky Court held that the lower Court had correctly rejected the pleading tendered since the issues sought to be raised by tendered pleading had been determined on the first appeal. In its short opinion entered June 12, 1951 (R 83), the Kentucky Court expressly stated that all issues, including that sought to be raised by the petitioner with respect to the "limitation on the extent of the use * * * of the sewer," had been determined in *Bond Bros.* v. *Louisville and Jefferson County Metropolitan Sewer Dist., et al.,* and *The B. F. Goodrich Co.* v. *Louisville*

and Jefferson County Metropolitan Sewer Dist., et al., 307 Ky. 689, 211 S. W. 2d 867 (R 61).

As heretofore stated, this latter opinion is the opinion and decision of the Kentucky Court which this Court has heretofore declined to review. *Louisville and Jefferson County Metropolitan Sewer District* v. *Bond Bros.*, 339 U. S. 943, 94 L ed 1358.

ARGUMENT.

No question decided by the Kentucky Court is such as to give this Court jurisdiction.

First Point.

THE KENTUCKY COURT HAS NOT DECIDED A FEDERAL QUESTION.

As the first question presented (R 62), the Kentucky Court determined as a matter of construction of the language of a deed and judgment that Producers reserved the right to the use, without charge, of the sewer, and that such right passed to its successors in title for similar industrial purposes (R 66).

The Kentucky Court then examined the contention of Petitioner that it was authorized to abrogate the contract and judgment (R 66) and held:

> (1) that the public demand or necessity was far from being great, and that there was in fact no imperious demand requiring the exercise of the police power to take property without compensation, and thus nullify the deed and judgment by which valuable rights were reserved to Producers; and

(2) that in any event the right of Respondent to the use of the sewer was protected by Sections 1 and 13 of the *Kentucky Constitution* (R 68) which recognizes "as inalienable 'the right of acquiring and protecting property' and declares that the property of no citizen shall be taken 'or applied to the public use without the consent of his representative and without just compensation being previously made to him.' "

Petitioner (Br. 8, 12) attempts to raise the issue on this application for review that Petitioner has been denied constitutional rights. Even if Petitioner, a subdivision of the State, could conceivably have raised such an issue, no such contention, as shown by the Record, was advanced either in the lower Court or before the Court of Appeals.

There is thus no decision by the Kentucky Court of a Federal question.

Second Point.

REFERENCE BY THE KENTUCKY COURT TO FEDERAL DECISIONS WAS MERELY INCIDENTAL TO THE DECISION OF QUESTIONS OF KENTUCKY LAW.

In addition to a number of its own prior decisions, the Kentucky Court refers to the decisions in other jurisdictions relating to comparable questions. These include Illinois, Virginia, California, and other State Court decisions as well as decisions of this Court. Reference to a relevant decision of this Court no more indicates the determination of a Federal question than reference to a relevant decision of the Virginia Court indicates a determination of Virginia law. No deter-

mination of a Federal question was necessary to a decision of the case, and no language contained in the opinion supports the contention that the Court undertook to decide a Federal question.

In *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 79 L ed 191, this Court said:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Third Point.

IF IT BE CONSIDERED THAT A FEDERAL QUESTION WAS DECIDED, REVIEW SHOULD BE DENIED SINCE THE DECISION RESTS ON AN INDEPENDENT GROUND.

In the *Lynch case* (*supra*), there is the further statement:

> Where the judgment of the state court rests on two grounds, one involving a federal question and the other not * * * and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

Even if there were any basis in the language of the opinion upon which to raise the contention that the decision is based upon the construction of provisions of the *United States Constitution* as well as upon pro-

visions of the *Constitution of Kentucky,* nevertheless "the ground independent of a Federal question," *to-wit,* that based upon Sections 1 and 13 of the *Kentucky Constitution,* would be sufficient in and of itself to sustain the decision of the Court.

It is clear that the decision of the Kentucky Court did not require it to determine any Federal question. At best, the right claimed by Petitioner is only remotely assignable to a Federal question. Under such circumstances, no Federal question is presented here. *Southwestern Bell Telephone Co.* v. *State of Oklahoma,* 303 U. S. 206, 82 L ed 751; *Little* v. *Williams,* 231 U. S. 335, 58 L ed 256; *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 89 L ed 2092.

Fourth Point.

THIS COURT HAS ALREADY EXAMINED THE ISSUES PRESENTED BY THIS PETITION AND DENIED CERTIORARI.

Respondent is successor in title to a part of, and Bond Bros. to the balance of, the tract formerly owned by Producers which is subject to the easement and to which the reservation of right is appurtenant. When this controversy arose, Respondent and Bond Bros. filed separate actions for an adjudication of their respective rights. The actions were substantially similar; however, Bond Bros. sought a declaratory judgment while Respondent sought an injunction. The actions were consolidated for trial and were heard together on appeal. Only one opinion was handed down in the two cases (R 61). On return to the lower Court

an amended pleading was tendered by Petitioner in each case and was rejected by the Court. Petitioner promptly appealed from the judgment of the lower Court in each case; however, the appeal in this case was held not to have been perfected, *Louisville and Jefferson County Metropolitan Sewer District* v. *B. F. Goodrich Co.,* 312 Ky. 37, 223 S. W. 2d 887. The judgment entered in the *Bond Brothers* case was affirmed, *Louisville and Jefferson County Metropolitan Sewer District* v. *Bond Bros.,* 312 Ky. 600, 228 S. W. 2d 655.

Petitioner then applied to this Court for review and certiorari was denied. *Louisville and Jefferson County Metropolitan Sewer District* v. *Bond Bros.,* 339 U. S. 943, 94 L ed 1358.

Following its unsuccessful effort to obtain a review by this Court of the *Bond Bros.* case, Petitioner then perfected an appeal to the Kentucky Court in this case, with the result, as heretofore noted, that the Kentucky Court, affirming the second decision of the trial Court, held that the issues sought to be raised had been determined by the one opinion theretofore entered on the first appeals of this case and the *Bond Bros.* case.

Petitioner for a second time seeks to obtain a review by this Court of the issues heretofore determined by the Kentucky Court. No new question, applicable to a right of review by this Court, is presented. The contention that the use reserved was limited to the facilities existing at the time the reservation was made was advanced in the amended pleading tendered in this case, but was not raised in the *Bond Bros.* case. With respect, however, to the questions presented by

this petition, the two cases are in no way distinguishable.

This Court has already determined that on the facts presented certiorari would not be granted.

Fifth Point.

THE DECISION OF THE KENTUCKY COURT IS NOT ONE OF GENERAL IMPORTANCE.

Under no circumstances can it be said that the Kentucky Court has decided a question of general importance. The decision relates to one isolated tract of land in Jefferson County, Kentucky, having appurtenant rights as the result of a judgment and deed. It is not shown or even contended that any other tract of land has similar rights which would be affected by the decision in this case. Thus the narrow question presented is of no general importance even in the Jefferson County area. That it has no general importance or application elsewhere is evidenced by the fact that attention has not been directed to any decision of a similar question in any other jurisdiction.

As the Kentucky Court said (R 71), Respondent's "predecessor reserved or retained a right which it had, *viz.*, to use the same channel for drainage purposes." Other property owners served by the sewer did not have such a property right. The decision, applying provisions of the Kentucky Constitution, prevents Petitioner from confiscating Respondent's property right. If the elimination of that right is necessary for

the proper operation of the business of Petitioner, it may exercise its power of eminent domain[1] and compensate Respondent for the value of its right.

The principles relating to the right of a sovereign to exercise the police power, as announced by the Kentucky Court, are uniformly recognized by courts generally, and do not depart from decisions of this Court.

There is an express holding in this case that sewer construction or operation is within the police power, the Court saying:

> To accomplish that objective, the full force of the power may be applied, and that may require that property rights be subordinated even though they are otherwise within the protection of the Constitution. * * * If the menace has been removed, public necessity and general welfare have been met and served, and the object has been accomplished, the question is whether the police power may be asserted years afterward, to destroy property rights or to abrogate a contract made by the same unit of government in order to raise revenue to operate and maintain the facilities (R 66).

The limitations on such power are stated as follows:

> It is fundamental that such an extraordinary power is not without limitation for it may not operate unreasonably beyond the occasion or necessity of the case. It may not unreasonably invade private rights and thus violate those rights guaranteed under either the Federal or the State Constitution. The exercise of the power must

[1]Kentucky Revised Statutes §76.080; Appendix p. 16.

have a substantial basis and cannot be made a mere pretext for actions that do not come within the scope. To state it another way, the action of the government may not arbitrarily invade liberty or property rights under the guise of police regulation (R 67).

* * * * * * *

In the case at bar, the public demand or necessity is far from being great. There is in fact no imperious demand requiring the use of the police power to take property without compensation or destroy a contract or nullify a judgment (R 69).

CONCLUSION.

A considerable portion of the brief of Petitioner is devoted to such matters as, objection to the Kentucky Court's interpretation of the judgment and contract; a history of the police power in Kentucky;[1] alleged inconsistency between this decision and certain prior decisions of the State Court;[2] and a statement, outside the Record, to the effect that Petitioner has voluntarily ceased to discriminate against users of the sewers outside the City of Louisville.[3] It is not believed that these matters are relevant to the question sought to be presented nor that the extension of this brief in discussing them would be justified.

As pointed out by the Kentucky Court in its opinion, Petitioner's predecessor saw fit to acquire and pay for only a limited easement with respect to the tract

[1]Pet. page 20.
[2]Pet. page 24.
[3]Pet. page 10.

in question. If necessary or essential for the operation of its business, petitioner may, at any time, acquire the full easement by condemnation and payment of compensation therefor.[1]

The Kentucky Court correctly determined that the property right to use the sewer, a right appurtenant to an isolated tract of land and one not common to the owners of other property, should not be destroyed for the benefit of Petitioner and other property owners without compensation being made therefor.

No Federal question was determined by the Court and the decision is peculiar to the facts presented and not of general importance in the area served by the Petitioner or elsewhere.

The grounds upon which Petitioner applies for review in this case are in no respect distinguishable from those in its companion (the *Bond Bros.*) case, in which review by this Court has been denied.

Petition for writ of certiorari should be denied.

Respectfully submitted,

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Louisville, Kentucky,
October 8, 1951.

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[1]Appendix p. 16-7; *Kentucky Revised Statutes*, §76.080(6).

APPENDIX.

Kentucky Revised Statutes, §76.080.

General powers of district; rates, rentals and charges subject to approval of city legislative body. The district created under the provisions of this chapter is empowered:

(1) To have jurisdiction, control, possession, and supervision, of the existing sewer and drainage system of such city of the first class; to maintain, operate, reconstruct, and improve the same as a comprehensive sewer and drainage system, and to make additions, betterments, and extensions thereto, within the corporate limits of such city of the first class and within the limits of the county containing such city beyond such city limits, and to have all the rights, privileges, and jurisdiction necessary or proper for carrying such power into execution. No enumeration of powers in this chapter shall operate to restrict the meaning of this general grant of power or to exclude other powers comprehended within this general grant.

(2) To prepare or cause to be prepared and to be thereafter revised and adopted, plans, designs, and estimates of costs, of a system of trunk, intercepting, connecting, lateral, and outlet sewers, storm water drains, pumping and ventilating stations, disposal and treatment plants and work, and all other appliances and structures, which in the judgment of the board will provide an effective and advantageous means for relieving such city of the first class and areas in the county in which such city is located outside the city limits which may be embraced in the district, from inadequate sanitary and storm water drainage and from inadequate sanitary disposal and treatment of the sewage thereof, or such sections or parts of such system as the board may from time to time deem proper or convenient to construct, consistent with the plans and purposes of this chapter, and is authorized and empowered to take all such steps as the board may deem proper and necessary to effect the purposes hereof.

(3) To construct any additions, betterments, and extensions to the facilities of the district, by contract or contracts, or under, through, or by means of its own officers, agents, and employees. Provided, however, that before any construction of new sewers or the extension of any existing sewers is begun, the plans for all such projects shall, if said project is within the corporate limits of the City of Louisville, be first submitted to the Director of Works of the City of Louisville for approval by him, and, if so approved, then to be approved by ordinance adopted by the Board of Aldermen of the City of Louisville; and if said project is outside the corporate limits of the city of Louisville, the plans therefore shall then be first approved by the County Engineer of Jefferson County, and, if approved by him, then to be approved by proper action of the Fiscal Court of Jefferson County, except that if said project is without the corporate limits of the City of Louisville but within the corporate limits of any incorporated city, drainage district, or other political subdivision within Jefferson County, then such prior approval shall be obtained from the governing authorities of any such political subdivision or district.

(4) To establish, construct, operate, and maintain, as a part of the sewer and drainage system of the district, sewage treatment and disposal plants and systems and all the appurtenances and appliances thereunto belonging. Such sewage treatment and disposal plants may be located in the city, or beyond the limits of the city in the county in which the city is located, as the board may deem expedient.

(5) To acquire and hold such personal property as the board may deem necessary and proper for carrying out the corporate purposes of the district and to dispose of personal property when the district has no further need therefor.

(6) To acquire by purchase, gift, lease, or by condemnation, such real property or any interest, right, easement, or privilege therein, as the board may determine necessary, proper and convenient for the corporate purposes of the district, and to use the same so long as such corporate ex-

istence shall continue, and same is necessary or useful for the corporate purposes of the district. Condemnation proceedings may be instituted in the name of the district pursuant to a resolution of the board declaring the necessity for the taking, and the method of condemnation shall be the same as provided in KRS 416.120. When the board by resolution declares that any real property which it has acquired, or any interest therein, is no longer necessary or useful for the corporate purposes of the district, such real property and interest therein may be disposed of.

(7) To make bylaws and agreements for the management and regulation of its affairs and for the regulation of the use of property under its control and for the establishment and collection of sewer rates, rentals and charges, which sewer rates, rentals and charges, applicable within the limits of a city of the first class, shall be subject to the approval, supervision and control of the legislative body of such city as hereinafter provided.

(8) To make contracts and execute all instruments necessary or convenient in the premises.

(9) To borrow money and to issue negotiable bonds and to provide for the rights of the holders thereof.

(10) To fix and collect sewer rates, rentals, and other charges, for service rendered by the facilities of the district, which sewer rates, rentals, and other charges, applicable within the limits of a city of the first class, shall be subject to the approval, supervision and control of the legislative body of such city as hereinafter provided.

(11) To enter on any lands, waters and premises for the purpose of making surveys, and soundings and examinations.

Constitution of Kentucky, Sections 1 and 13.

SECTION 1. *Inherent and inalienable rights.*—All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

1. The right of enjoying and defending their lives and liberties.

2. The right of worshipping Almighty God according to the dictates of their consciences.
3. The right of seeking and pursuing their safety and happiness.
4. The right of freely communicating their thoughts and opinions.
5. The right of acquiring and protecting property.
6. The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.
7. The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons.

SECTION 13. *Jeopardy; property not to be taken without compensation.*—No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.